

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1136

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

-against-

JOHN LEFEBVRE,

Appellant.
-----X

Docket No. 77-1136

On Appeal From the United States District
Court of the Northern District of New York

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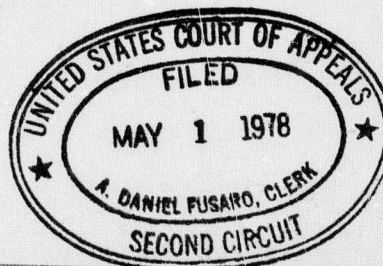


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BRIEF FOR THE APPELLANT

PRELIMINARY STATEMENT

JOHN LEFEBVRE ("LEFEBVRE"), Appellant, appeals from a judgment of conviction entered in the United States District Court for the Northern District of New York for conspiracy to distribute marijuana in violation of 21 USC §846 following a three-week jury trial before Chief Judge James T. Foley. Appellant received a sentence of six months imprisonment with a special parole term of two years.

Appellant had been named in the indictment along with sixteen (16) other defendants. Only four (4) defendants proceeded to trial, to wit: Appellant LEFEBVRE, Kevin Cooney ("COONEY"), Harold Levy ("LEVY") and Bruce Kay ("KAY"). Cooney and Levy received a sentence of eighteen (18) months imprisonment and Kay received a six (6) month sentence.

The indictment alleged that the four defendants had engaged in a conspiracy between July 1972 and June 1975 for the purpose of distributing marijuana "at or near Albany". The five overt acts alleged that during this period of time

there were large deliveries of marijuana to Latham and Crescent, New York, suburban towns near Albany, New York.

To prove the conspiracy and each defendant's participation therein, the Government called five (5) witnesses: Robert Roth ("ROTH"), Marc Cohen ("COHEN"), William Katz ("KATZ"), Paul Moskowitz ("MOSKOWITZ"), and Paul Cammusa ("CAMMUSA"). Each witness was an accomplice who confessed to participating in efforts to distribute marijuana in the Albany area, and with the exception of Moskowitz and Cammusa who had been granted immunity, each had been co-defendants named in the indictment. Upon agreeing to cooperation with the Government, Roth's case was dismissed under a pretrial diversion program. Cohen was permitted to plead guilty to simple possession of marijuana, and the conviction was deferred under the provisions of 21 USC §844(b)(1). Katz pleaded guilty to the conspiracy count, was adjudged a youthful offender, and received a suspended sentence before trial.

STATEMENT OF THE CASE

I. THE GOVERNMENT'S PROOF OF THE CONSPIRACY AND APPELLANT'S PARTICIPATION THEREIN.

It appears from the testimony of Roth and Moskowitz, that in June 1972 Cooney and Levy had entered into an agreement whereby large shipments of marijuana would be transported by automobile from Cooney in Tuscon, Arizona to Levy in Albany, New York (T164-165).

Once Cooney had moved to Tuscon, marijuana shipments

began to flow from Tuscon to Albany by various drivers of automobiles.

Roth, Cohen and Moskowitz testified that for sums between \$700.00 and \$1200.00 they each drove shipments of marijuana by automobile from Cooney's house in Tuscon to Levy's house in Albany. On return trips money and empty suitcases were sent back to Cooney in Tuscon, Arizona. The marijuana came in brick form and when they arrived it was weighed and packaged in smaller amounts for resale in the Albany area (T165-167, 430-436, 619-626, 1333-1338).

The Government rests its entire case against the appellant on the testimony of the accomplices, Roth, Cohen, Katz, Moskowitz, ~~Kay~~ and Cammusa.

Roth testified to meeting the appellant on three occasions: the first in the Fall of 1972 where Levy told the appellant in the company of Katz that he could pick up marijuana from Levy (T183); the second time in March 1974 after a load of marijuana was delivered by Kay. Appellant and Katz thereafter appeared to pick up an unknown quantity of marijuana (T209). The third time was in April 1974 after a delivery of marijuana by Kay, and Katz and the appellant "came to pick up whatever they were going to pick up out of that load". Katz's testimony is completely void of these "pick-up's" of marijuana from Levy's home.

The Government's witness Cohen who lived with the appellant and testified to transporting marijuana from Tuscon,

Arizona to New York many times for Cooney and Levy and stated that on only one occasion did he tell the appellant that he was going to Tuscon, Arizona for marijuana. His further testimony showed that the appellant took no part in the preparation for the trip or in the receiving of the marijuana (T444-445).

The Government then used the accomplice Katz to testify as to his conspiracy with Levy, Cooney and Cohen. Katz testified that he lived with Cohen and the appellant and that in February 1973, Katz introduced together with Cohen, the appellant to Levy. The reason for the introduction was to see if Levy would sell marijuana to the appellant. An introduction was made but there was no conversation between Levy and the appellant (T614-615). Katz never testified as to any participation by the appellant in the conspiracy in question.

The Government's next witness was another accomplice Cammusa, who testified under a grant of immunity that he had purchased quantities of marijuana from the appellant, sometimes in the company of Cohen (T1023) and sometimes in the company of Katz (T1033). Both Cohen and Katz's testimony was void of these sales. However, no where in Cammusa's testimony could it be ascertained that the marijuana bought came from the Tuscon, Arizona - Albany, New York conspiracy. It is interesting to note that on cross-examination, Cammusa testified to an agreement between himself and Katz to import drugs from Nogalis, Arizona from an individual named Philip Nyer, and that the said marijuana was transported by plane

(T1118, 1122, 1153, 1127). This was a separate agreement, a separate conspiracy.

The next Government witness was Moskowitz, an admitted hardcore drug seller, an admitted liar (T1525) and an accomplice in the conspiracy in question, who initiated the instant case in June 1975 when he had three State charges pending and facing 15 years in jail if convicted of possession of cocaine. Moskowitz testified as to the conspiracy between Levy and Cooney in Tuscon and Albany. As to the appellant, he testified that in May 1973 he met Katz and the appellant at Levy's house where they all unloaded an auto containing marijuana and each took a quantity (T1299-1302). Katz's testimony was void of any such activity. Moskowitz further testified that in November 1973 the same situation occurred with the appellant and Katz (T1311). Katz's testimony is also void as to this activity.

The witness further testified that in August of 1974 he saw the appellant in an automobile coming back from Tuscon, Arizona, with marijuana and that Katz, he and the appellant unloaded it into the Levy house (T1339-1340). Katz's testimony is void of this incident.

II. THE EVIDENCE OF THE \$25,000.00 CASH
SEIZURE IN NEW MEXICO IN SEPTEMBER 1974.

Following the testimony of the accomplice witnesses at the trial, the Government offered evidence concerning the

seizure of \$25,000 cash from an automobile driven by one Andrew J. Blossy ("BLOSSY") on September 27, 1974 in Las Cruces, New Mexico. Blossy was neither a witness, defendant, nor a co-conspirator in this case. Blossy could not be located by the Government for trial. In the opening, the prosecutor told the jury that the Government would call Blossy as a witness, "we hope" (T138). To prove the evidence of this seizure, the Government called Michael Hauser ("HAUSER"), two officers of the New Mexico Police Department and D.E.A. Agent, James Montagne ("MONTAGNE").

Hauser was a co-defendant who plead guilty to simple possession of marijuana, a misdemeanor. Hauser, an admitted seller of marijuana in Ithaca, testified that he had hired Blossy to drive an automobile from Ithaca, New York to Kevin Cooney in Tuscon, Arizona. This had nothing to do with any activities involving Levy or the Albany operation. Hauser provided Blossy with an automobile, two empty suitcases and \$25,000 cash which was placed in a box in the trunk of the car. In addition, Hauser instructed Blossy to call "Kevin" upon his arrival in Tuscon and gave him Kevin's phone number on a slip of paper (T1702-05, 1711-12, 1717-19, 1721-22).

While driving through Las Cruces, New Mexico, en route to Tuscon, Blossy was stopped by a New Mexico police officer for speeding. Upon an alleged consent search, the officer found the \$25,000 cash, marijuana residue in the two empty suitcases, and a set of heavy-duty shock absorbers.

In addition, the officer obtained "Kevin's" phone number from Blossy and notified the narcotic agents (T1652-55). D.E.A. Agent Montagne made three telephone calls to the number listed to Kevin. On the first two calls, a woman named "Chris" answered and stated that Kevin had been waiting for Blossy but was not at home. Montagne testified that both of these conversations were tape recorded, but the tapes were inadvertently erased (T1774-89).

Montagne, posing as Blossy, made a third call to "Kevin". The agent first attempted to induce Cooney to come to New Mexico upon the grounds that the car had broken down. But Cooney refused, suggesting that the car be fixed with the money on hand. Montagne then asked Cooney if he could "drive the car back with a load and would you give me \$1,000?" Cooney allegedly replied, "Yes, of course." The investigation, however, ended there. Montagne admitted that he did not follow through with his investigation based upon this information. Instead, he simply filed a report of the incident with his agency. Upon the investigation in the Northern District of New York, this information eventually came to the attention of the D.E.A. agent in charge of the investigation, which lead them to the Blossy evidence (T1774-89).

III. THE JURY DELIBERATIONS AND THE INTER-
ROGATION OF JUROR NO. 10, MRS. JUDITH
EARL, PRIOR TO ACCEPTING THE GUILTY
VERDICT.

The record shows that except for a dinner break, the jury deliberated from 11:05 a.m. until 11:35 p.m., a period of approximately 11 hours on December 22, 1976. During the course of the deliberations, the jury made specific requests for the reading of testimony concerning appellant. Upon a reading of the testimony, it was approximately 11:15 p.m. The following day was Christmas Eve. Many of the jurors lived great distances from the courthouse.

The Judge advised the foreman that, "It is getting late. It is a quarter after eleven" and inquired whether or not the jury wished to retire for the evening and resume deliberations the following morning. The foreman responded, "We would like a little time for deliberations..." and the jury returned to the jury room.

No more than 10 minutes had elapsed when the jury sent a note that it had reached a verdict. The foreman announced, in response to the Clerk's inquiry, that "All of us here, we all find Defendants, Mr. Cooney, guilty; Mr. Lefebvre, guilty; Mr. Levy, guilty; Mr. Kay, guilty."

Counsel for each defendant requested that the jury be polled. Under the polling procedure, each juror was to announce his or her verdict when the juror's name was called. Each juror was first polled as to the defendants Cooney, Levy and appellant. Without any equivocation whatever, each juror, including Juror No. 0, Judith Earl, announced his or her verdict of "guilty".

Then, the polling process began as to Kay. When the Clerk called the name of Juror No. 10, Mrs. Judith Earl, she did not answer "Guilty". Instead, she answered as follows (T2308):

THE CLERK: Juror Number 10, Judith Earl.

JUROR NO. 10 (EARL): I would like to say not sure, but I say guilty because of the other -- realizing that all --

THE COURT: (Interrupting) Speak right out.

JUROR NO. 10 (EARL): I would like to say, not sure, but realizing that I am not going to persuade eleven jurors to change their vote.

THE COURT: What is your verdict, your judgment?

JUROR NO. 10 (EARL): Guilty.

THE COURT: All right.

The Clerk then proceeded to poll Jurors No. 11 and 12. Recognizing the equivocation of Mrs. Earl's responses, the Judge began an interrogation concerning her verdict. She was asked whether she had surrendered any conviction because of pressure. Mrs. Earl responded (T2309):

JUROR NO. 10 (EARL): I definitely feel pressures.

THE COURT: What did you say?

JUROR NO. 10 (EARL): I definitely feel pressures.

THE COURT: I can't hear you.

JUROR NO. 10 (EARL): I definitely feel pressure on this decision.

When the Judge inquired as to the nature of the pressures, Mrs. Earl pointed out that she had been unsuccessful in persuading the other jurors to review the Court's charge relating to conspiracy, and the requirements to become a member of the conspiracy. The Judge stated: "Wasn't that made clear to you?" There was no response.

Mrs. Earl then went on to state her doubts about Kay's guilt (T2310).

The Court again asked Mrs. Earl, "Are you under any pressure?" There was a substantial pause. Mrs. Earl made the following statement (T2311):

JUROR NO. 10 (EARL): I concede that Bruce Kay is guilty.

Whereupon the Judge announced that he was going to take her verdict.

All counsel sought to object but the Court immediately propounded these questions to Mrs. Earl and accepted the verdict.

Motions were immediately made to set aside the verdict because Mrs. Earl expressed that she had a question of the Court unanswered prior to her verdict.

A formal post-verdict motion was thereafter filed on behalf of appellant to set aside the verdict. The Court denied the motion with a 13 page memorandum decision in which it found that there was no coercion or reasonable doubt on the part of Mrs. Earl.

POINT I

APPELLANT DID NOT RECEIVE A FAIR TRIAL AND WAS PREJUDICED BY THE RECEIPT OF EVIDENCE CONCERNING THE SEIZURE OF \$25,000 CASH IN NEW MEXICO AND THE ALLEGED TELEPHONE CONVERSATION BETWEEN KEVIN COONEY AND LAW ENFORCEMENT OFFICERS.

Appellant contends on this appeal that he was severely prejudiced by the admission of substantial evidence concerning the seizure of \$25,000 cash from Andrew J. Blossy in Las Cruces, New Mexico on September 27, 1974. The basis for our contention is the fact that the entire Blossy incident was unrelated to the conspiracy on trial, constituted hearsay evidence, and necessarily had an impressionable, but unwarranted, impact upon the jury in support of the Government's case against appellant. Outside of the evidence of the Blossy incident, the Government's case rested solely upon the testimony of four accomplice witnesses whose credibility had been vigorously attacked on cross-examination and had to be weighed with caution and care.

The Government's obvious purpose in offering evidence of the Blossy incident was to lend credence to the accomplices' testimony through testimony of law enforcement officers, and the physical evidence seized. The \$25,000 cash, two suitcases containing marijuana residue and the heavy-duty shock absorbers, all provided vivid evidence of a similar character from which the jury could infer the accomplices must be

telling the truth concerning the method of shipping marijuana from Tuscon to Albany.

The record reveals, however, that the Blossy incident did not occur in furtherance of the conspiracy on trial. It related to a separate conspiracy between Cooney and Hauser for the distribution of marijuana in Ithaca, New York. It had nothing to do with Cooney's arrangement with Levy to distribute marijuana in Albany, New York. Appellant had no connection whatever with Hauser or any arrangements involving Ithaca. The only common denominator between the two ventures was co-defendant Cooney.

Prior to the Government introducing evidence concerning the Blossy incident, appellant's counsel strenuously objected to the proposed proof upon the ground that it constituted hearsay of a prejudicial nature, and was not in furtherance of the conspiracy proven by the Government. The Judge was informed that appellant's contentions were supported by (a) Blossy's Grand Jury testimony; (b) the proposed testimony of Michael Hauser; and (c) the D.E.A. showing a diagram of Cooney's separate marijuana operations. From all three sources, it appeared beyond any doubt that Blossy's trip on behalf of Hauser related solely to a conspiracy between Cooney and Hauser to ship marijuana from Tuscon, Arizona to Ithaca, New York.

The Judge's attention was also called to two recent decisions of this Court pointing out that it is improper to

admit evidence of a separate conspiracy simply because one or more of the defendants on trial may have been involved in both conspiracies: United States v. Miley, 513 F.2d 1191, 1205-1208 (1975); and United States v. Bertolotti, 529 F2d 149, 154-158 (1975).

Counsel for the defendant Kay offered the D.E.A. Report for the Judge's consideration in support of his argument. The Judge read the report, but was unpersuaded. Appellant's counsel then offered the transcript of Blossy's Grand Jury testimony, and further offered to call Hauser as a witness, out of the presence of the jury, to establish beyond any doubt that this incident was unrelated to appellant or the conspiracy on trial. The Judge rejected both proffers.

In support of admitting this evidence, the Government conceded that appellant was not in any way involved in the Blossy incident. Instead, it sought to justify the admission upon the following grounds. First, the incident occurred in furtherance of the conspiracy because Roth testified Cooney had stated that his marijuana operation extended to the midwest, Ithaca, Elmira and Binghamton (T291). Secondly, the evidence corroborated witnesses' testimony that Levy had stated that \$30,000 had been seized from one of his drivers, and Levy and Cooney had to bear the loss equally (T673, 1054).

We submit that neither ground justified offering the evidence against appellant. To begin with, Cooney's narrative statement to Roth that he had been engaged in

various marijuana operations did not prove that the four defendants on trial had been engaged in Cooney's Ithaca operation. Nor could it be construed as broadening the scope of the conspiracy, in the face of the Government's proof that the four defendants were involved only in the marijuana shipments sent from Tuscon to Albany. Secondly, the evidence did not corroborate the Government's witnesses' claim that the money seized related to Levy's operations in Albany. The non-hearsay evidence produced by the Government showed, through the testimony of Hauser, that the Blossy incident did not at all involve the activities of Levy in Albany. This was confirmed by the Grand Jury testimony of Blossy. Thus, the Government's premise that the evidence related to the Levy operations in Albany was disproved by its own evidence of the Blossy incident.

Had the Blossy evidence not been admitted, there exists a distinct possibility that appellant would not have been convicted. The jury would have had to decide the case solely on the testimony of five witnesses who were self-confessed criminals that had obtained lenient treatment and immunity from their testimony at trial.

It requires no imagination to recognize the impact of the Blossy evidence. Instead of relying upon accomplice testimony, the Government was able to present three law enforcement officials whose testimony could be more readily accepted because of their status, and the fact that the jury

did not have to weigh their credibility with caution and care. Secondly, the similarity of the physical evidence concerning the automobile, large sums of cash, suitcases and shock absorbers could only have impressed the jury when weighing the accomplices' testimony concerning their alleged automobile shipments from Tuscon to Albany. Thirdly, the sworn testimony of the D.E.A. agent that Cooney was willing to pay \$1,000 for Blossy to drive a shipment of marijuana served to underscore the credibility of what the accomplices testified was their arrangement with Levy for driving shipments from Tuscon to Albany.

Appellant could not effectively cross-examine any of the witnesses because none of this evidence related to him. This compounded by the alleged loss of tape recordings concerning the agent's conversations with Cooney. Once the jury was convinced of Cooney's guilt beyond a reasonable doubt, then the deliberation process must have lead the jury to be inclined to believe and accept the proposition that appellant was likewise guilty of the conspiracy.

Indeed, the Government's reliance and the impact of this evidence is demonstrated by the prosecutor's summation to the jury. After arguing at length the reasons the jury should accept the credibility of each accomplice, the prosecutor turned to the Blossy evidence. To refute the defense contentions that the Government's case rested solely on accomplice testimony without any supporting evidence, the

prosecutor retorted (T2064):

"You know, there were no drugs and no marijuana (seized). But they (the defense) overlooked that the Government was going to show a direct arrow, a direct arrow from Michael Hauser, and his twenty-five thousand dollars to Kevin Cooney. They overlooked that there was going to be a direct arrow from the Ithaca operation to Harold Levy in the Albany operation."

The prosecutor proceeded for four more pages of the transcript arguing that the Blossy evidence proves the conspiracy on trial. He concluded his remarks by stating (T20669):

"But Ladies and Gentlemen, Montagne's testimony, and the close of this line of testimony we submit to you, that a conspiracy (proven) is clear."

Under the foregoing circumstances, we respectfully submit that appellant was deprived of a fair trial because the evidence had a prejudicial "spill-over effect" against appellant. The evidence of the Blossy evidence should not have been admitted because it was wholly unrelated to appellant or the conspiracy on trial. There was no reason for appellant to know or have reason to believe that Cooney had been engaged in a separate marijuana operation in Ithaca, New York, with Hauser. No evidence was offered to show appellant's awareness of Cooney's Ithaca operation. To hold appellant accountable as a co-conspirator for the Blossy trip evidence would be contrary to the teachings of this Court in the MILEY and BERTOLOTTI (supra) cases, and in

violation of appellant's right of confrontation.

The Trial Judge should have excluded the evidence. No limiting instruction would suffice to overcome the prejudicial effort of this evidence. For these reasons, we submit that the judgment of conviction should be reversed and a new trial ordered.

POINT II

THE JUDGMENT OF CONVICTION SHOULD
BE SET ASIDE BECAUSE THE RECORD
SHOWS THAT JUROR NO. 10, JUDITH EARL,
HAD REQUESTED ADVICE REGARDING THE
COURT CHARGE BEFORE HER VERDICT
WAS ACCEPTED; SAID ADVICE WAS NOT
GIVEN BY THE COURT.

Appellant contends that the verdict below must be set aside because it does not represent a unanimous verdict of 12 jurors. Juror No. 10, Judith Earl, admitted upon being polled that she harbored a reasonable doubt as to the defendant Kay's guilt, and that she voted guilty simply because she could not persuade 11 other jurors. The Court's interrogation unduly pressured the juror into her guilty verdict of Kay. We respectfully submit that the Court's interrogation, coupled with the late hour, the 10 hours of deliberation and the pressing Christmas holiday, all contributed to undue pressure upon this juror in returning a vote of guilty as a matter of convenience as to the appellant.

Even though Juror No. 10, Judith Earl, when polled with reference to her guilty verdict as to Kay, not only stated her doubt as to Kay's guilt but also stated:

"I definitely feel pressure on this." At which time the Court retorted: "What kind of pressure?" "Did you listen to the opinion of the other jurors?". At which time Mrs. Judith Earl replied:

JUDITH EARL (JUROR NO. 10): Yes. I have
requested that we ask Your Honor to review

the legal advice, or the legal charge that you gave us about the conspiracy, relating to the part where they said that they would have to be involved in only a small portion of the conspiracy, or not to be convicted.." (T2309-10) (emphasis added)

The Court then asked, "Well, isn't that...". Mrs. Earl stated "I don't know." The Court then asked "Wasn't that made clear to you?" The Court never received a response answer nor attempted to elicit the answer.

The appellant was not mentioned as a main character in the conspiracy and each accomplice who testified did not corroborate each other as to the role the appellant played in the conspiracy. The juror's confusion as to what the charge of conspiracy was in relation to those who were involved in a "small portion of the conspiracy" substantially prejudiced the appellant. Since Juror No. 10 (Judith Earl) used the word "they" regarding her request for advice, she could have only meant Kay and the appellant. The Court should have given her the advice she requested and recharged Conspiracy and allowed her to deliberate with the other Jurors until, if possible, a unanimous verdict was reached.

The Court never defined to this confused Juror the meaning of "coercion" nor did he elicit the reason why the foreman, Mr. Chow, never transmitted Juror No. 10's request for a re-charge of the crime of Conspiracy.

Therefore, Juror No. 10 could not give a true verdict regarding the appellant until her question was answered and she had an opportunity to deliberate again.

All the attorneys for the respective defendants because of the manner in which the Court asked the question were not given the opportunity to request a re-submission of the charge to the Jury and had they been given the opportunity, it would have been denied.

It is fundamental that no person may lawfully be convicted by a jury unless every juror actually agrees that upon the evidence and the law of the case that the person is guilty. United States v. Pleva, 66 F2d 529, 531-33 (2nd Circuit, 1933). Here Juror No. 10, Judith Earl, was not in agreement as to the law of the case and therefore could not apply the law to the facts.

Because of the foregoing reasons, it is respectfully submitted that the judgment of conviction should be reversed and a new trial ordered because the guilty verdict was not unanimous against appellant.

CONCLUSION

THAT BASED ON THE FOREGOING POINTS,
THIS CONVICTION SHOULD BE SET ASIDE
AND A NEW TRIAL GRANTED.

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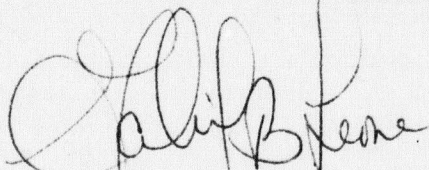
STATE OF NEW YORK, COUNTY OF NASSAU ss.:

MARIANNE LEONE, being duly sworn, deposes and says: Deponent is not a party to the action, is over 18 years of age and resides at 109 Locust Street, Garden City, New York.

On April 30, 1978, deponent served the within brief and appendix of the Appellant JOHN LEFEBVRE upon the honorable PAUL V. FRENCH U.S. Attorney for the Northern District of New York, attorney's for the appelle in this action at 100 S. Clinton Street, Syracuse, New York 13202, the address designated by said attorneys for the purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in - a post office - official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

On the same date your deponent did in the same manner serve upon the attorneys for the appellant BRUCE KAY, HAROLD J. LEVY, AND KEVIN T. COONEY.

Sworn to before me on ^{MAY 19}~~April 30~~, 1978



GABRIEL D. LEONE
Notary Public, State of New York
No. 33-74-12339
Qualified in Nassau County
Commission Expires March 30, 1978

Marianne Leone

MAY 15th

Alfred B. Stone

Marianne Stone

GABRIEL R. LEONE
Notary Public, State of New York
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Qualified in Nassau County
Commission Expires March 30, 1978

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